

Osorio v Cosmopolitan Optometry, P.C.
2022 NY Slip Op 34028(U)
November 29, 2022
Supreme Court, New York County
Docket Number: Index No. 157966/2018
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY **PART** **23**

Justice

-----X

DEREK OSORIO,

Plaintiff,

- v -

COSMOPOLITAN OPTOMETRY, P.C., LENSRAFTERS,
INC.D/B/A LUXOTTICA RETAIL NORTH AMERICA INC.,
THE LENSRAFTERS FOUNDATION,

Defendant.

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INDEX NO. 157966/2018

MOTION DATE 07/20/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 42, 43, 44

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In Motion Sequence 002, Plaintiff moves for an order pursuant to CPLR § 3025(b) for leave to amend the caption to add Third-Party Defendant Tek-Net, Inc. (hereinafter “Tek-Net”) as a direct defendant and to deem the Second Supplemental Summons and Second Amended Verified Complaint as having been served. Third-Party Defendant Tek-Net opposes.

In Motion Sequence 003, Plaintiff moves for an order pursuant to CPLR § 3025(b) for leave to amend the caption to add Third Third-Party Defendant Topcon Medical Systems, Inc. (hereinafter “Topcon Medical”) as a direct defendant and to deem the Second Supplemental Summons and Second Amended Verified Complaint as having been served. This motion is unopposed.

This action commenced on August 27, 2018 relating to an incident on February 13, 2017. A Third-Party action was commenced against Tek-Net on May 19, 2020. A Second Third-Party

action against Tek-Net was commenced on May 28, 2020. A Third Third-Party action was commenced against Topcon Medical on May 5, 2021. Plaintiff seeks to add Tek-Net and Topcon Medical as defendants, arguing that he was unaware of their involvement in the alleged incident at issue when the action was initially filed. It is uncontested that the statute of limitations has already expired and Tek-Net opposes on that ground.

“A party may amend his or her pleading...at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just...” (CPLR § 3025[b]). “It is well established that leave to amend a pleading is freely given ‘absent prejudice or surprise resulting directly from the delay.’” (*Anoun v City of New York*, 85 AD3d 694, 694 [1st Dept 2011] [quoting *Fahey v Cty of Ontario*, 44 NY2d 934, 935 (1978)]; *see also* CPLR 203[c]).

“[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are “united in interest”...The doctrine thus gives courts the “sound judicial discretion” to identify cases “that justify relaxation of limitations strictures ... to facilitate decisions on the merits” if the correction will not cause undue prejudice to the plaintiff’s adversary...the three conditions that must be satisfied in order for claims against one defendant to relate back to claims asserted against another are that:

“(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.”

(*Buran v. Coupal*, 87 N.Y.2d 173, 177-178 [1995] [citations omitted]). It is uncontested that the first prong of this test is satisfied here. Tek-Net argues that Plaintiff has not demonstrated that Tek-Net is united in interest with the original defendants or that Tek-Net knew or should have known that the action would have been brought against them as well.

“The classic test for determining unity of interest is whether the defenses between the parties are the same such that their interests stand or fall together. Where the relationship between parties is such as to give rise to vicarious liability of one for the conduct of the other, a unity of interest will be found.” (*Ellis v. Newmark & Company Real Estate, Inc.*, 209 AD3d 520, 520 [1st Dep’t 2022]; *see also Raschel v Rish*, 69 NY2d 694, 697 [1986] [“defendants will be considered united in interest, rather than joint tort-feasors, when one is vicariously liable for the acts of the other”]). Plaintiff argues that Tek-Net is united in interest with the defendants as there is a contract in place between Tek-Net and defendant outlining Tek-Net’s duty to maintain and repair the electronic chair that created an agency relationship. Tek-Net disagrees, arguing that they were an independent contractor. However, Plaintiff has sufficiently established that Tek-Net could be found to be vicariously liable, even as an independent contractor, and has thereby satisfied the second prong of the relation back doctrine. *See, e.g., DeSanna v Rockefeller Center, Inc.*, 9 A.D.3d 596, 599 (3d Dept 2004) (affirming application of relation back doctrine where “RCN, as owner of the building, could be found to be vicariously liable if RCMC, even as an independent contractor, is ultimately found to be its agent.”); *see also Brunero v City of NY Dept of Parks & Recreation* (121 AD3d 624, 626 [1st Dep’t 2014]).

“With regard to the third relation-back condition, a plaintiff need only show a mistake was made in not adding additional defendants before the applicable statute of limitations expired, not that the mistake was also excusable.” (*Ellis v Newmark & Company Real Estate Inc.*, 209 AD3d AD3d 520, 520 [1st Dep’t 2022]). Plaintiff has also satisfied the third prong under the Brock test because plaintiff could not and did know the identity of the third-party defendant and their potential liability at the time the original complaint was filed against the defendants. Tek-Net’s assertion that Plaintiff was required to list John Doe and then identify that John Doe is not supported.

Topcon Medical has not opposed either of the other two prongs or Plaintiff's request to add them as a defendant and the court finds that Plaintiff, within its discretion, that a relaxation of the limitations strictures is appropriate as applied to them. Accordingly, it is hereby

ORDERED, that Plaintiff's motions to amend the caption and add Tek-Net and Topcon Medical and to deem the Supplemental Summons and Amended Verified Complaints as having been served on these parties are granted; and it is further

ORDERED, that the caption shall now read:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 23**

-----X
DEREK OSORIO,

Plaintiff,

Index No.: 157966/2018

-against-

**COSMOPOLITAN OPTOMETRY, P.C.,
LENSCRAFTERS, INC., d/b/a LUXOTTICA RETAIL
NORTH AMERICA INC., and THE LENS CRAFTERS
FOUNDATION, TEK-NET, INC., TOPCON MEDICAL
SYSTEMS, INC.,**

Defendants.

-----X
**COSMOPOLITAN OPTOMETRY, PC,
Third-Party Plaintiff,**

-against-

**TEK-NET, INC.,
Third-Party Defendant.**

-----X
**LUXOTTICA RETAIL NORTH AMERICA INC.,
improperly named as LENS CRAFTERS INC. d/b/a
LUXOTTICA RETAIL NORTH AMERICA INC.,
Second Third-Party Plaintiff,**

-against-

**TEK-NET, INC.,
Second Third-Party Defendant.**


-----X
COSMOPOLITAN OPTOMETRY, PC,
Third Third-Party Plaintiff,

-against-

TOPCON MEDICAL SYSTEMS, INC.,
Third Third-Party Defendant.
-----X

And it is further;

ORDERED that the parties are directed to meet and confer and submit a proposed status conference order to the court within 30 days for review and signature.

11/29/2022 DATE		 WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE